



No. 458.

Office Supreme Court U. S.
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Op. of Hilburn on question pro-
IN THE *founded by Court*
SUPREME COURT OF THE UNITED STATES.

Filed Mar. 14, 1900.

GEORGE T. MURDOCK

VS.

JOHN G. WARD, COLLECTOR, ETC.

458.

Memorandum in support of the contention that the tax on legacies under the War Revenue Act of 1898 is determined by the amount of the legacy and not by the amount of the whole personal estate.

The construction of the Act, which I am persuaded is the true one, is that wherever the phraseology "the total amount of such personal property" is used in Section 29 to fix the rate of the tax, it refers to the personal property constituting any legacy or distributive share, and not to the personal property constituting the whole estate. At first blush that phraseology may seem to apply wherever used to the whole estate in the hands of the administrators, executors or trustees; but a closer examination decidedly favours the construction which relates it to the personal property constituting any legacy or distributive share. The section reads as follows: "That any person or persons having in charge or trust as administrators, executors or trustees any legacies or distributive shares arising from personal property, where the whole amount of such

personal property as aforesaid shall exceed the sum of ten thousand dollars in actual value, passing . . . from any person . . . to any person or persons, etc., shall be and hereby are made subject to a duty or tax . . . as follows, that is to say : where the whole amount of said personal property shall exceed in value . . . the sum shall be, etc." Does that mean, giving the language its natural significance, the whole amount of the personal property constituting all the legacies or distributive shares in their hands passing to all the legatees, or the whole amount of the personal property passing from a testator to any legatee? The latter seems to me its clear purport.

It is to be observed that it is only legacies or distributive shares arising from personal property that are taxable. Legacies or distributive shares arising from real property or the proceeds of real property are not taxable. That limitation was the reason for the insertion of the phrase "arising from personal property," which runs through the Act and introduces what ambiguity there is. But for that limitation it would have been unnecessary to qualify the terms "legacies" and "distributive shares" at all. It is an important consideration that the real reason for introducing the phrase "personal property" was to limit the tax to legacies and distributive shares arising from personal property, and not to express the idea that the whole personal estate was the measure of the tax.

The next idea to be expressed was that only legacies or distributive shares arising out of personal property over a certain amount were to be taxed, and that was accomplished by the phraseology "where the whole amount of such personal property as aforesaid shall exceed the sum of ten thousand dollars in actual value, etc." The reason for that cumbersome phraseology was evidently the

presence of the language which had been used to confine the taxation to legacies and distributive shares arising out of personal property. It is only when the whole amount of personal property constituting a legacy or distributive share exceeds ten thousand dollars that the tax is payable.

Then follow the provisions for the rate of taxation on such legacies or distributive shares exceeding that amount. At this point the precise phraseology of the Act is to be particularly observed. It is that "any legacies or distributive shares arising from personal property . . . passing . . . from any person . . . to any person or persons . . . are hereby made subject to a duty or tax . . . as follows: Where the whole amount of said personal property shall exceed in value ten thousand dollars and shall not exceed in value the sum of twenty-five thousand dollars the tax shall be, etc." Does not that clearly mean—any legacy or distributive share arising from personal property, passing from one person to another, by will or intestacy laws, shall be subject to a given tax where the whole amount of said personal property—that is, the personal property passing from *one person* to *another* or in other words, each particular legacy or distributive share—shall exceed in value the sum of, etc. ?

I think that as between a construction which fixes the amount of the tax according to the amount of the estate, making the Act very unjust in its operation, and, as is claimed, unconstitutional, and a construction which fixes the rate of taxation according to the amount of the legacy, making the Act much more fair and just in its operation, the latter should be chosen. Strongly confirmatory of this position is the principle underlying this tax. The basis of the tax is the right or privilege of taking under a will or intestacy laws. The right or privi-

lege is the right or privilege of the person who takes. The just measure of the taxation of that right or privilege as a taxable entity is properly governed by certain considerations founded on real and substantial distinctions. To classify legatees for purposes of taxation according to their relationship to the testator is natural and just. To classify them according to the amount of the benefit received under the right or privilege is also, it may be assumed, natural and just. But to classify them according to the size of the estate out of which the legacies are payable is obviously unjust and utterly unreasonable. To tax the son of one man more than the son of another man on legacies of the same amount because the estate of one father is larger than that of the other is a measure devoid of reason and principle, considering that the taxable entity is precisely the same in both instances—the benefit derived by each from the right or privilege of taking under a will. The same is true of the various classes of collaterals in the same degree and the class of strangers. Courts will not be inclined to give the Act that intolerable operation when another construction which preserves the underlying principle of the tax is open to them.

This question has not been passed upon in the case of *High v. Coyne, Collector*, 93 *Fed. R.*, No. 540, nor has it yet been explicitly raised that I know of. It is true that the debates in Congress indicate that the prevailing idea was that the graduation of the tax was according to the amount of the whole estate, but that is not a consideration which has much weight in the construction of statutes when there are serious questions of reasonableness, justice and constitutionality involved.

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